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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1974

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No. 74-190

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MARY ALICE MARSHALL, WILLIAM HUNT, FANNIE MAE JAMISON, WILLIE MAE ALLEN, ROSA LEE BROWN, JOE E. SCOTT, ANDREW LEE, for themselves and for all others similarly situated,
Petitioners,

v.

WILLIAM F. GAVIN, J. WILLARD SMITH, MARSHALL D. CANNON, as members of the Levy County Jury Commission,
Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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# BRIEF FOR RESPONDENTS IN OPPOSITION

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September 27, 1974

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of dismissal rendered by the United States District Court for the Northern District of Florida is noted at 495 F.2d 1371, and is set forth in the appendix to the Petition at page 1a. The opinion of the United States District Court for the Northern District of Florida is reported at 365 F.Supp. 613, and is set forth in the appendix to the Petition

at pages 3a - 12a. A motion for leave to file an out-of-time petition for rehearing was denied by order dated July 1, 1974, and is set forth in the appendix to the Petition at page 2a.

## Jurisdiction

Respondents do not question the jurisdiction as set forth in the Petition.

## Questions Presented

I

WHETHER A THREE-JUDGE PANEL WAS REQUIRED TO ADJUDICATE THE CONSTITUTIONALITY OF THE "MOTHER'S EXEMPTION" PROVISION OF SECTION 40.01(1), FLORIDA STATUTES.

II

WHETHER THE "MOTHER'S EXEMPTION" PROVISION OF SECTION 40.01(1), FLORIDA STATUTES, RENDERS AN UNCONSTITUTIONAL RESULT IN LEVY COUNTY VENIRE SELECTION.

III

WHETHER THE USE OF THE VOTER LISTS IN THE PREPARATION OF VENIRE ROLLS DISCRIMINATES AGAINST THE BLACK CITIZENS OF LEVY COUNTY.

## Statement of the Case

Petitioners' statement of the case is substantially correct.

## ARGUMENT

### I

### The attack on the Statute was clearly insubstantial. A three-judge panel was not required.

The District Court refused to convene a three-judge federal court in order to adjudicate the constitutionality of the "Mother's Exemption" of Section 40.01(1), Florida Statutes, because it appeared to the Court that the constitutional question raised was insubstantial and had been foreclosed by prior Supreme Court decisions.

Petitioners attacked Section 40.01(1), Florida Statutes, as unconstitutional on its face due to the "Mother's Exemption" which exempts mothers of children under eighteen years of age from jury duty upon request. The portion of the statute assailed reads as follows:

> (1) Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one

> (21) years, who are citizens of this state and who have resided in this state for one (1) year and in their respective counties for six (6) months and who are fully qualified electors of their respective counties; provided, however, that expectant mothers and mothers with children under eighteen (18) years of age, upon request, shall be exempted from grand and petit jury duty... (Emphasis supplied)

A three-judge panel is required whenever a statute is attacked as unconstitutional on its face unless the claim presented is clearly insubstantial. Swift and Co. v. Wickham, 382 U.S. 111 (1965); Mayhne's Super Liquor Store, Inc. v. Meiklejohn, 426 F.2d 142 (5th Cir. 1970). The tests for substantiality are whether or not the constitutional claim is obviously without merit, or whether its unsoundness clearly results from the previous decisions of the Supreme Court. Forbush v. Wallace, 341 F.Supp. 217 (D.Ala. 1971), aff. 405 U.S. 970.

The District Court believed that the constitutional claims were without substantial merit due to earlier Supreme Court decisions. To determine the propriety of that decision, the constitutional question must be examined.

(a)

A statutory provision exempting pregnant women or women with children under eighteen years of age, upon request, is not unconstitutional.

Petitioners argue that §40.01(1), Florida Statutes, is unconstitutional on its face due to the provision exempting pregnant women and women with children under eighteen years of age from jury service upon request. It must be noted at the outset that this provision is not automatic. All female citizens of Florida who are fully qualified electors are eligible for jury service. They are exempted from such service only if they so request. This exemption differs from the provisions in Hoyt v. Florida, 368 U.S. 57 (1961); and Healey v. Edwards, 363 F.Supp. 1110 (E.D.La. 1973), wherein all women were automatically excluded from jury service unless they submitted a written declaration of desire to serve. The amended Florida provision exempts only pregnant women and women with children under eighteen years of age and only if they so request. Because all women are not exempt, and because the exemption extends only to those who desire it, a substantial percentage of the female population remains available for jury service. It was this distinction which lead the District Court to consider the constitutional issues insubstantial.

The District Court ruled that the constitutional question concerning the "Mother's Exemption" was foreclosed by the decision in Hoyt v. Florida, supra. The District Court noted that while the Hoyt doctrine has been eroded by time, see: Reed v. Reed, 404 U.S. 71 (1971), and Healey v. Edwards, supra, that the rule of Hoyt requiring a showing of discrimination by substantial evidence was unscarred. The Opinion-Order of the District Court comments upon the lack of substantial evidence of discrimination in the record comprised of stipulated statistics.

Several recent cases have examined various exemptions from jury service available in different states. In Zelechower v. Younger, 424 F.2d 1256 (9th Cir. 1970), a physician had been indicted for grand theft. He attacked the California statute which excluded certain professionals from sitting on grand juries. The court found that such exclusions were reasonable and not unconstitutional, where the excluded class was not arbitrarily defined, and dismissed the complaint. In United States v. Eskew, 460 F.2d 1028 (9th Cir. 1972), the court was faced with a challenge to the California statutes which permitted an exemption from jury duty upon request to all persons over seventy years of age and to all women who had children under 12 years of age. The court found that such exemptions were not improper. Leighton v. Goodman, 311 F.Supp. 1181 (S.D.N.Y. 1970), presents the problem in a somewhat different light. In Leighton a prospective male juror challenged the New York statutory provisions providing an exemption from jury service to women as violative of equal protection of the law. The court held that so long as a reasonable basis existed for the questioned exemption, it would not sit as a superlegislature to determine the wisdom of the policy.

Petitioners rely heavily upon the recent decisions in Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), and Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), to support their theory that the distinction made between males and females by §40.01(1) is an unreasonable and, therefore, unconstitutional distinction based upon an antiquated

view of American family life. Petitioners' reliance upon Frontiero and Reed in this regard is misplaced. The nearly ridiculous distinctions attacked in Reed and Frontiero cannot be compared to the provision in question here.

The rationale behind this statutory scheme is similar to that enunciated in Hoyt v. Florida, supra. Certainly, the principle of Hoyt authorizing the complete exemption of women from jury service can no longer be defended. In this regard, Respondents agree with the rule of Healey v. Edwards, supra. Such an automatic exemption requiring affirmative action in order for a woman to be placed in consideration for jury service is indeed a "benign dispensation" which would certainly result in an extremely low percentage of females on jury panels. However, the present Florida exemption process does not run that same risk of nearly complete exemption. These provisions do not constitute an "interference" with the right to a fair and impartial jury within the meaning of the Healey case. As the stipulated facts reflected, the percentage of women claiming the exemption did not result in a severe decrease in the number of available women jurors. As the records further demonstrated, only 31% of all women in the eligibility file claimed an exemption. The remaining 69% was in marked contrast to the statistics shown in the Hoyt case.

Granted, that while a great number of women with children do pursue business careers, the vast majority remain at home engaged in the full-time, 24-hour day task of rearing children, providing a home for the entire family,

and doing daily household work.* Although some women now question this arrangement, the Florida legislature has recognized the burden jury duty imposes upon the busy mother of small children. This is not a benign recognition of some inherent frailty on the part of all women, but rather an exemption available to a few who are in need of it. Similar exemptions for various professionals have long withstood attack, because of the same rationale. Rawkins v. Georgia, 201 U.S. 638, 640 (1905); Zelechower v. Younger, 424 F.2d 1256 (9th Cir. 1970). In this regard, the Hoyt doctrine remains alive. Respondents certainly realize that an argument could never now be made for excluding all women, or providing an exemption, either automatic or by request, for all women. However, the provision reviewed here is a limited one, not designed to "keep women in their place" but rather to provide a shield available to those women for whom jury service would be a severe burden.

The legislative classification involved here does not make an arbitrary choice premised upon wholly mistaken conceptions of women in today's world. It advances a legitimate objective in a manner consistent with equal protection standards. The decision in Kahn v. Shevin, --U.S.-- (4/24/74), recognizes that women are faced with problems which justify certain forms of differential treatment. The Florida jury selection statute does not decree, in effect, that female participation in the administration of justice is not as essential as male participation, nor does it relegate women

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* See footnote 7, Kahn v. Shevin, --U.S.--, (4/24/74).

"to inferior legal status without regard to [their] actual capabilities." Frontiero v. Richardson, supra at 687.

In view of the authorities cited by the District Court and those discussed above, the Court of Appeals was not in error when it correctly affirmed the decision of the District Court that the challenge to §40.01(1) was insubstantial and did not require a three-judge court.

## II

### The selection of jurors from the voter rolls does not discriminate against black persons.

Petitioners contend that the use of voter lists alone as the source of names for the jury lists, pursuant to §40.01(1), Florida Statutes, discriminates against black persons.

Many courts have considered this question and have held jury selection solely from voter lists to be constitutional. United States v. Butera, 420 F.2d 564 (1st Cir. 1970); United States v. DiTommaso, 405 F.2d 385 (4th Cir. 1969), cert. den. 394 U.S. 934; Sanders v. United States, 415 F.2d 621 (5th Cir. 1969); United States v. Dangler, 422 F.2d 344 (5th Cir. 1970); Camp v. United States, 391 F.2d 419 (5th Cir. 1969); Grimes v. United States, 391 F.2d 709 (5th Cir. 1968), cert. den. 593 U.S. 825. Petitioners contend that black potential plaintiffs are discriminated against because of the low percentage of black voters which results in a similarly

low percentage of black voters which results in a similarly low percentage of blacks on jury lists. This argument may be valid but is obviously misdirected. The statutory scheme is valid on its face, however, due to a failure of black citizens to register to vote, black plaintiffs face possible discrimination. It would be absurd to argue that black citizens are actively prevented from registering to vote in Florida in this day and age and indeed, Petitioners do not make that argument. Furthermore, the record did not reflect that there was any sort of discrimination against black citizens who have attempted to register as electors. Any misrepresentation of blacks on jury panels or voter registration lists in Levy County, Florida, is not the result of action or inaction on the part of Respondents but rather it is indicative of a failure on the part of the black citizens of Levy County to exercise the franchise and rights and duties of a citizen.

This argument was highlighted by the record in this case which reflected that black persons who represented 11.51% of the registered voters in Levy County in 1969 constituted 12.81% of the individuals on Levy County jury lists. In 1971, 11.08% of the registered voters were black, and 14.39% of the individuals on the juror lists were black. Obviously, these figures reflect that if more blacks would register to vote, the percentage of blacks on the jury lists would rise accordingly. As the record reflected, the existing statutory scheme operates to provide an adequate percentage of blacks for juries, assuming that black persons will register to vote, sharing the same burden of

citizenship duties which rests upon the white citizens of Levy County. Allegations of an unconstitutional result must fail completely.

Petitioners point to the companion cases of Carter v. Jury Commission of Greene County, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970) and Turner v. Fouche, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970), for the valid proposition that where the use of voter rolls alone for the source of venire names creates an imbalance between the number of black and white jurors, due to systematic discouragement of black voter registrations, the use of the voter rolls alone as a source of names is not sufficient. Respondents agree with this doctrine, but would point out that there has been no showing in this case that anyone has discouraged blacks from registering to vote in Levy County. Absent such a showing, it cannot be assumed that a lack of black voters is caused by racial discrimination of any form. Relief in the form of an order requiring the Jury Commission to draw blacks at a higher rate would have been inappropriate in absence of any evidence that the lower percentage of black voter registrations was prompted by any cause other than black voter apathy. To have required drawing black jurors from sources other than voter lists would have required a similar showing of discrimination.

Petitioners' contentions of an unfair result in Levy County were not supported in fact. This District Court properly resolved this issue and the Court of Appeals was not in error when it summarily affirmed the action of the District Court.

## Conclusion

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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## Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was furnished, by mail, to RUTH BADER GINSBURG, and MELVIN L. WULF, 22 East 40th Street, New York, New York 10016; LAUGHLIN McDONALD, NEIL BRADLEY, and SARAJANE LOVE, 52 Fairlie Street, N.W., Atlanta, Georgia 30303; and KENT SPRIGGS, 118 N. Gadsden Street, Tallahassee, Florida 32301, this 27th day of September, 1974.

Daniel S. Dearing